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Supreme Court of the United States

OCTOBER TERM, 1950

No. 355

COBBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES, APPELLANT,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED OCTOBER 12, 1950.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation, Defendants and Respondents

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN TO THE SUPREME COURT OF THE UNITED STATES—Filed September 1, 1950

To the Chief Justice of the Supreme Court of the State of Wisconsin:

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, respectfully shows:

1. Petitioner is the plaintiff-appellant in the above entitled cause.

2. Plaintiff-appellant, Corbin D. Hughes, filed a complaint in the Circuit Court of Milwaukee County, State of Wisconsin, for a cause of action for wrongful death, based on the Illinois Wrongful Death Statute, Sections 1 and 2 of Chapter 70 of Smith and Hurd Illinois Annotated Statutes. Summary judgment was entered by the trial court dismissing the plaintiff's complaint on the merits.

3. On appeal from said judgment to the Supreme Court of the State of Wisconsin the decision of the trial court was affirmed by said Supreme Court on the 8th day of May, 1950, by written decision, and thereafter your petitioner applied for rehearing, which was denied by said court on the 30th day of June, 1950.

[fols. 2-3] 4. In said cause there is drawn in question the validity of Section 331.03 of the Revised Statutes of the State of Wisconsin, on the ground of its being repugnant

to Section 1 of Article IV and Section 1 of the Fourteenth Amendment of the United States Constitution. The decision of the Supreme Court of the State of Wisconsin is in favor of its validity.

5. The plaintiff-appellant, Corbin D. Hughes, as the Administrator of the Estate of Harold G. Hughes, considers himself aggrieved by the judgment of the Supreme Court of Wisconsin entered on the 30th day of June, 1950.

Wherefore, petitioner prays for an order allowing an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Wisconsin may be examined; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiff-appellant; that the material parts of the record, proceedings and papers upon which said final judgment and decree were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

Dated at Milwaukee, Wisconsin, this 29th day of August, 1950.

Samuel Goldenberg, Counsel for Petitioner.

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 1, 1950

The petition of Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, and the assignment of errors filed therewith, and the record of said cause having been considered,

It Is Ordered that an appeal be and hereby is allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin, as prayed in said petition, and the Clerk of the Supreme Court of the State of Wisconsin is directed to prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within twenty (20) days from date hereof.

It Is Further Ordered that the said Corbin D. Hughes, as Administrator of the Estate of Harold G. Hughes, shall give good and sufficient security in the sum of two hundred and fifty dollars ($250.00); that said plaintiff-appellant shall prosecute said appeal to effect, and that if said plain-
[fols. 5-8] tiff-appellant fails to make his plea good he shall answer all costs.

The said plaintiff-appellant now presenting a bond in the sum of two hundred and fifty dollars ($250.00), with Continental Casualty Company as surety,

It Is Ordered that the same be and it is hereby approved.

The appeal shall operate as a supersedeas.

Dated at Madison, Wisconsin, this 29th day of August, 1950.

Oscar M. Fritz, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 9] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 1, 1950

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, plaintiff-appellant in the above entitled cause, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final judgment of the Supreme Court of Wisconsin dated the 30th day of June, 1950.

The Supreme Court of Wisconsin erred:

In holding that Section 331.03, Wisconsin Statutes (as construed by the Supreme Court of Wisconsin in its opinion

under date of May 2, 1950), did not violate the Full Faith and Credit Clause (Section 1, Article IV, U. S. Constitution) and the Due Process Clause (Section 1, Fourteenth Amendment, U. S. Constitution).

Wherefore, plaintiff-appellant prays that the final decree of the Supreme Court of Wisconsin be reversed, and for such other relief as the Court may deem fit and proper.

Samuel Goldenberg, Counsel for Plaintiff-Appellant.

[fols. 10-52] [File endorsement omitted]

[fols. 53-60] [Caption omitted]

[fol. 61] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, Plaintiff,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation, Defendants

COMPLAINT—Filed July 24, 1948

First Cause of Action

Now comes the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, by Backus & Parson, his attorneys, and complains of the defendants and alleges as follows:

1. Plaintiff was appointed administrator of the Estate of Harold G. Hughes by the County Court of Milwaukee County on the 24th day of May, 1948. Said Corbin D. Hughes resides at 3135 North 53rd Street, Milwaukee 10, Wisconsin, and is a sales engineer by occupation.

2. Defendant Glenn C. Fetter resides at 2367 North 38th Street, City and County of Milwaukee, State of Wisconsin. At the times hereinafter mentioned he was in the United States Army, being stationed at Fort Knox, Kentucky.

3. The defendant, Farmers Mutual Automobile Insurance Company is a Wisconsin corporation and maintains an office at 231 West Wisconsin Avenue in the City and County of Milwaukee, State of Wisconsin, and is engaged in business as an insurance corporation issuing to its assured policies of casualty insurance insuring its assured as the [fol. 62] owners and operators of automobiles against loss and damage for personal injury and against loss and damage for property damage occasioned by the ownership, maintenance and operation of such insured's automobiles on the highways within the United States, and duly authorized to issue the policy of casualty insurance hereinafter mentioned and involved in this case.

• • • • • • •

5. Illinois Highway 40 is a highway running in a generally east and west direction through the State of Illinois and runs east and west through the Village of Montrose, Effingham County, State of Illinois. The Dietrich-Montrose Road is a macadam highway running generally north and south in the County of Effingham, State of Illinois, and runs through the Village of Montrose, at which village it intersects with Illinois Highway 40.

6. Plaintiff alleges upon information and belief that on January 9, 1948 at about seven-thirty o'clock p. m. the defendant Glenn C. Fetter was driving the Studebaker [fol. 63] Sedan aforementioned in a generally northerly direction on said Dietrich-Montrose Road; said Harold G. Hughes, now deceased, was riding in said automobile as a passenger for hire at said time; said defendant Glenn C. Fetter was negligently operating his said automobile at an excessive rate of speed and drove through a stop sign at the intersection of said Dietrich-Montrose Road and Highway 40 in the Village of Montrose and collided with a truck being driven West on said highway 40, turning over the truck as a result of said collision.

• • • • • • •

8. Plaintiff alleges on information and belief that said deceased exercised due care and caution for his own safety at the time of said collision and prior thereto.

[fols. 64-65] 9. As a result of the negligence of the defendant, Glenn C. Fetter aforesaid, Harold G. Hughes, deceased,

sustained personal injuries consisting of a fractured skull and internal injuries, resulting in his death on January 11, 1948 at the City of Effingham, County of Effingham, State of Illinois, leaving him surviving his father, Corbin Hughes, a step-mother, Dorothy Hughes, both of Milwaukee, and a brother, Dale Hughes of Rock Island, Illinois.

10. By reason of the death of said Harold G. Hughes, caused and occasioned as aforesaid, the said Corbin D. Hughes has lost the society and companionship of his said son, aged 18, and has been deprived of his future aid and assistance, and has otherwise sustained a pecuniary loss of $15,000.

Wherefore, Plaintiff, Corbin D. Hughes, as Administrator of the Estate of Harold G. Hughes, deceased, demands judgment against the defendants in the sum of Fifteen Thousand ($15,000.00) Dollars, together with the costs and disbursements of this action.

* * * * * * *

[fol. 66] Backus & Parson, Attorneys for Plaintiff.

Duly sworn to by Corbin D. Hughes. Jurat omitted in printing.

[fol. 67] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ANSWER OF DEFENDANT, GLENN C. FETTER—Filed October 7, 1948

Now comes the defendant, Glenn C. Fetter, by Hannan, Johnson & Goldschmidt, his attorneys, and answering the complaint of the plaintiff herein, admits, denies and alleges as follows:

1. Admits, in answer to paragraph 4, that prior to the 9th day of January, 1948, the defendant, Farmers' Mutual Automobile Insurance Company, issued and delivered to one Leo Fetter, father of this answering defendant, its policy of automobile liability insurance, which said policy of insur-

ance was in full force and effect on said last mentioned date, subject, however, to all of the terms, limitations, conditions and exclusions therein contained.

2. Admits that on said 9th day of January, 1948, at about 7:20 o'clock in the evening of said day, this answering defendant was operating a Studebaker automobile owned by the said Leo Fetter, which said automobile was being operated in a northerly direction on and along the Dietrich-Montrose Road, near the Village of Montrose, Effingham County, Illinois; admits that at said time and place Harold G. Hughes was a passenger in said automobile; denies that the said Harold G. Hughes was a passenger for hire at said time; admits that a collision occurred between the automobile driven by this answering defendant and an automobile truck which was being operated in a westerly direction on and along Highway 40.

3. Denies that this answering defendant was careless, negligent or guilty of failure to exercise ordinary care in any of the manners set forth in paragraphs 6 and 7 of [fol. 68] said complaint, or in any other manner.

4. Denies that the said Harold G. Hughes exercised due care and caution for his own safety at the time of said collision and immediately prior thereto.

5. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 9 and 10 of said complaint with respect to the injuries and damages alleged to have been sustained by the plaintiff herein and the said Harold G. Hughes and, because of the lack of such knowledge and information, denies said allegations and puts plaintiff to his proof with respect thereto.

And as and for his answer to the second alleged cause of action, this answering defendant admits, denies and alleges as follows:

1. Reiterates with the same force and effect as if fully set forth herein, his answers to paragraphs 1 to 5, inclusive, and paragraphs 8 to 10, inclusive, of the first alleged cause of action.

2. Admits that on the 9th day of January, 1948, at about 7:20 o'clock in the evening of said day, this answering defendant was driving the Studebaker Sedan owned by the said Leo Fetter, which said automobile was being operated

in a northerly direction on and along said Dietrich-Montrose Road; admits that at said time the said Harold G. Hughes was a passenger in said automobile; admits that a collision occurred between the Studebaker automobile driven by this answering defendant and an automobile truck, which truck was being driven in a westerly direction on and along Highway 40.

3. Denies that this answering defendant, with conscious indifference to surrounding circumstances and conditions, was guilty of willful and wanton negligence in any of the manners alleged in paragraph 3 of said second cause of action, or in any other manner.

4. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 with respect to the injuries and damages alleged to have been sustained by the plaintiff and by the said Harold G. Hughes, and because of the lack of such knowledge and information, denies said allegations and puts plaintiff to his proof with respect thereto.

[fols. 69-72] Wherefore, this answering defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements.

Hannan, Johnson & Goldschmidt, Attorneys for Defendant, Glenn C. Fetter.

Duly sworn to by W. J. Goldschmidt. Jurat omitted in printing.

Service admitted Sept. 29, 1948. Backus & Parson, Plaintiff's attorneys.

[fol. 73] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE TO ADMIT OR DENY—Filed May 13, 1949

To: Hannan, Johnson & Goldschmidt, Attorneys for Defendants, Glenn C. Fetter and Farmers Mutual Automobile Insurance Company.

Please Take Notice that the plaintiff in the above entitled action, pursuant to Sec. 327.22 Wisconsin Statutes, hereby demands that you admit or refuse to admit in writing, within

five days, the specific facts hereinafter set out. In case of your refusal to so admit, the plaintiff will ask the Court to tax as costs against the defendants the reasonable expenses of proving the same.

1. That Harold G. Hughes died on January 11, 1948 at the City of Effingham, County of Effingham, State of Illinois.

2. That Harold G. Hughes sustained personal injuries consisting of a fractured skull and internal injuries in said collision on January 9, 1948.

3. That Harold G. Hughes died from injuries sustained on January 9, 1948 as the result of a collision between the Studebaker automobile driven by the said Glenn C. Fetter and a truck which was being operated in a westerly direction on and along highway 40.

4. That said truck being driven west on said highway 40 [fols. 74-75] was turned over on its right side as the result of said collision with the Studebaker car driven by the said Glenn C. Fetter.

5. That the Studebaker automobile driven by Glenn C. Fetter was completely demolished in the collision.

6. That the following is a true and correct copy of Ordinance No. 18 regulating the speed and management of automobiles within the corporate limits of the Village of Montrose, Effingham County, State of Illinois:

"Ordinance No. 18

An ordinance Regulating the speed and management of automobiles within the corporate limits of the Village of Montrose:—

Section 1. Be it ordained by the President and Board of Trustees of the Incorporated Village of Montrose, Effingham County, Illinois; That it shall be unlawful for any owner, manager, or person in the possession or control of any automobile, to run or propel the same on or through the streets, within the limits of said Village, at a greater rate of speed than ten miles per hour, or purposely, heedlessly and recklessly manage and control the same, in such a manner as to be dangerous to persons or property, within said Village. Any

person or persons violating any of the provisions of this ordinance shall be subject to a penalty of not less than ten dollars nor more than two hundred dollars for each offense; and it shall be the duty of the Police Constable to arrest any person or persons he may observe violating any of the provisions of this ordinance, and take such person or persons before the Police Magistrate of said Village, and there file a complaint against such person or persons, that they may be tried for the violation of this ordinance.

Passed July 5th, 1904. Approved July 5th, 1904. N. J. Faber, Village President, John Gaebel, Jr., Village Clerk."

Dated, January 14, 1949.

Backus & Parson, Attorneys for Plaintiff.

Received. Jan. 14, 1949. Hannan, Johnson & Goldschmidt.

[fol. 76] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT OF DEFENDANT, GLENN C. FETTER, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

Glenn C. Fetter, being first duly sworn, on oath, deposes and says that he is one of the defendants in the above entitled action; that, as such defendant, he has knowledge of the facts herein set forth and makes this affidavit in support of a motion of the defendants for a summary judgment dismissing the complaint upon its merits, with costs; that he makes this affidavit on his own behalf and on behalf of his co-defendant, Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, with whom he is united in interest and by whom he is duly authorized to do so; that plaintiff's action is one brought by the plaintiff to recover damages resulting from the alleged wrongful death

of Harold G. Hughes, deceased son of Corbin D. Hughes, plaintiff and administrator of the estate of the said Harold G. Hughes, deceased, occasioned by the alleged negligent operation of a motor vehicle by affiant within the State of Illinois on January 9th, 1948; that, upon information and belief, the said Harold G. Hughes, plaintiff's intestate deceased, died on the 11th day of January, 1948, in the City of Effingham, Effingham County, State of Illinois, as a result of injuries sustained by him in the accident, as aforesaid, as more fully appears from the allegations of the verified complaint on file herein and particularly from the allegations of paragraph 9 of the first alleged cause [fol. 77] of action of said complaint and by the allegations of paragraph 4 of the second alleged cause of action of said complaint; and that he believes that this action has no merit as to the defendants for the reason that it appears from the foregoing and from the face of the complaint that the action is not one brought for a death caused in the State of Wisconsin and is not, therefore, maintainable under the provisions of Section 331.03, Wisconsin Statutes, and that, therefore, no cause of action, as alleged, or otherwise, exists against the defendants, or either one of them.

Glenn C. Fetter.

Subscribed and sworn to before me this 11th day of May, 1949. W. J. Goldschmidt, Notary Public, Milw. County, Wis. My commission expires Oct. 30, 1949.

[fol. 78] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

W. J. Goldschmidt, being first duly sworn, on oath, deposes and says that he is one of the attorneys for the defendants in the above entitled action; that, as such attor-

ney, he has knowledge of the facts herein set forth and makes this affidavit in support of a motion of said defendants for a summary judgment dismissing the complaint upon its merits, with costs; that he is duly authorized to make this affidavit for and on behalf of said defendants; that plaintiff's action is one brought by plaintiff to recover damages resulting from the alleged wrongful death of Harold G. Hughes, deceased, occasioned by the alleged negligent operation of a motor vehicle by the defendant, Glenn C. Fetter, within the State of Illinois on January 9th, 1948; that, upon information and belief, said Harold C. Hughes died on the 11th day of January, 1948, in the City of Effingham, Effingham County, State of Illinois, as a result of injuries sustained in said accident, as more fully appears from the allegations contained in paragraph 9 of the first alleged cause of action of the verified complaint on file herein and by the allegations contained in paragraph 4 of the second alleged cause of action of said complaint; and that he believes that this action has no merit as to the defendants, Glenn C. Fetter and the Farmers' Mutual [fol. 79] Automobile Insurance Company, a Wisconsin corporation, for the reason that it appears from the foregoing and from the face of the complaint that the action is not one brought for a death caused in the State of Wisconsin; and is not, therefore, maintainable under the provisions of Section 331.03, Wisconsin Statutes, and that, thereforé, no cause of action, as alleged, or otherwise, exists against the defendants, or either one of them.

W. J. Goldschmidt.

Subscribed and sworn to before me this 11th day of May, 1949. Herbert L. Hible, Notary Public, Milwaukee County, Wis. My commission expires 9-10-50.

Copy received this 12th day of May, 1949. Backus & Parson, Attorneys for Plaintiff.

[fol. 80] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT —Filed May 20, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

Francis H. Parson, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled action and makes this affidavit on plaintiff's behalf, being duly authorized so to do.

This action was commenced on or about July 2, 1948 by plaintiff as administrator of the estate of Harold G. Hughes, on behalf of the next of kin of said Harold G. Hughes, consisting of Corbin D. Hughes, his father, his step-mother, Dorothy Hughes, and his brother, Dale Hughes. Any recovery made in this action will be distributed to the next of kin.

This action for wrongful death is brought under Sections 1 and 2, Chapter 70, Smith and Hurd Illinois Annotated Statutes, a copy of which sections are included in Exhibit "A" and made a part hereof and a part of the record in this case as if specifically set forth herein.

This action is not brought under Wisconsin's wrongful death statute, Section 331.03 for the reason that the wrong-
[fol. 81] ful act as set forth in the complaint occurred in the State of Illinois under the Illinois rules of the road and the death occurred in the State of Illinois.

The right relied upon by the plaintiff was created by the foregoing law of the State of Illinois. The law of Wisconsin does not create a right of action for a death occurring in another state, but Wisconsin allows a suit on a foreign right of action for wrongful death to be brought in its courts.

That there is involved herein, as appears by the allegations of the complaint, the host-guest statute of Illinois, Section 58A of Chapter 95½ of Smith and Hurd Annotated Illinois Statutes. The complaint is based entirely upon Illinois law and is based upon the violation of Section 167, Chapter 95½ (Smith and Hurd Illinois Annotated Statutes)

relating to stopping at intersections and section 146A of Chapter 95½ relating to a twenty-five mile an hour speed in residential districts, and a twenty mile per hour — in a business district.

This case has been heard in conciliation before Hon. Daniel W. Sullivan on two occasions, on January 18, 1949 and February 23, 1949, and the Court and counsel for the defendant were fully advised at said times that this case was brought under the Illinois wrongful death statute and for violation of the aforementioned Illinois statutes relating to the laws of the road, and involving the Illinois host-guest statute. Various decisions of the Illinois court relating to damages and negligence under the host-guest statute were discussed at that time. Prior to the service of the complaint in this matter, and after service of the complaint, defendants' counsel were at all times advised by affiant, [fol. 82] and were aware of the same, that this action was brought under the Illinois wrongful death statute for violation of the Illinois laws in connection with the host-guest statute of that state.

That Sections 58A, 167, and 146 of Chapter 95½ of the Illinois Statutes are also set forth in Exhibit "A," attached hereto and made a part of the record in this case as if specifically set forth herein.

This affidavit is made in opposition to a motion for summary judgment and defendants' motion should be denied with costs.

Affiant further asks that the Illinois wrongful death act, Sections 1 and 2, Chapter 70, Smith and Hurd Illinois Annotated Statutes, and the host-guest statute, 58A of Chapter 95½ and Sections 146 and 167 of Chapter 95½, be incorporated in the complaint as paragraph 11 of the first cause of action and paragraph 5 of the second cause of action.

Francis H. Parson.

Subscribed and sworn to before me this 18 day of May, 1949. Ruth Louise Miller, Notary Public, Milwaukee County, Wis.

[fol. 83] EXHIBIT "A" TO AFFIDAVIT

Smith and Hurd Illinois Annotated Statutes:

"Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Sec. 2. Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

Chapter 95½

"Sec. 58A. No person residing in a motor vehicle as a guest, without payment for such ride, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner or his employee or agent for injury, death or loss, in case of accident, unless

such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or its owner or his employer or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which action is brought."

"Nothing contained in this section shall be construed to relieve a motor vehicle carrier of passenger for hire of responsibility for injury or death sustained by any passenger for hire."

"Sec. 167. Vehicle entering through highway or stop intersection. The department may in its discretion and when traffic conditions warrant such action, give preference to traffic upon any of the State Highways under its jurisdiction, upon which has been constructed a durable, hard-surfaced road over traffic crossing or entering such high- [fols. 84-87] way by erecting appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway should come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give right of way to vehicles upon the highway."

"Sec. 146A. No person shall drive a vehicle of the first division as described in Article I of this act, upon any public highway in this -tate at a speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle of said first division, operated upon any public highw y in this state where the same passes through the business district of any city, village or incorporated town exceeds twenty miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this state where the same passes through the residence district of any city, village or incorporated town exceeds 25 miles an hour, or if the rate of speed of any such motor vehicle operated on a public highway in this State in a suburban district, exceeds thirty-five miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

[fol. 88] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO AMEND—
Filed May 20, 1949

STATE OF WISCONSIN,
Milwaukee County, ss.

Francis H. Parson, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled action and makes this affidavit in plaintiff's behalf, being duly authorized so to do, in support of an application for leave to amend. That this action was commenced on the 2nd day of July, 1948, and brought to recover for a wrongful death occurring in Illinois under the Illinois wrongful death action.

The wrongful death statute of Illinois and the laws of the road of Illinois were not set out in detail in said complaint, due to the fact that this court takes judicial notice of these statutes as a matter of law under Section 328.01 Wisconsin Statutes.

That this case has been heard in conciliation before Hon. Daniel W. Sullivan on two occasions on January 18, 1949 and February 23, 1949, and the Court and counsel for the defendant were advised that this case was brought under [fol. 89] the Illinois wrongful death statute and for the violation of the Illinois law of the road, and subject to the host-guest law of Illinois. That prior to the service of the summons and complaint, defendant's counsel had also been so advised. Defendants have not been taken by surprise.

Defendants' motion for summary judgment has raised some question as to under what statute and what law this action is brought. In the interest of protecting the plaintiff's rights and in the furtherance of justice, plaintiff asks that the complaint be amended as set forth in this motion.

Francis H. Parson.

Subscribed and sworn to before me this 18 day of May, 1949. Ruth Louise Miller, Notary Public, Milwaukee County, Wis.

[fol. 90] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ORDER FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT —Filed November 17, 1949

The motion of the defendants for a summary judgment against the plaintiff having come on for hearing before that branch of the above named court presided over by the Hon. Charles L. Aarons, Circuit Judge, on the 20th day of May, 1949, the said defendants appearing by Hannan, Johnson & Goldschmidt, represented by Herbert L. Wible, their attorneys, and the plaintiff appearing by Backus & Parson, represented by Francis H. Parson, its attorneys, and the Court having been well and sufficiently advised in the premises and having made and filed a memorandum decision herein, dated the 28th day of October, 1949, wherein it is decided that the defendants' motion for summary judgment dismissing the complaint must be granted;

Now, Therefore, on motion of Hannan, Johnson & Goldschmidt, attorneys for defendants;

It Is Ordered that judgment be entered herein in favor of the defendants, Glenn C. Fetter and Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, and against the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, dismissing the complaint on the merits, together with costs and disbursements.

Dated at Milwaukee, Wisconsin, this 10th day of November, 1949.

By the Court:

Chas. L. Aarons, Circuit Judge.

Copy received 11/11/49. Francis H. Parson.

[fol. 91] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST THE PLAINTIFF—Filed November 25, 1949

The motion of the defendants for summary judgment herein having come on for hearing before that branch of the above named court presided over by the Hon. Charles L. Aarons, Circuit Judge, on the 20th day of May, 1949, the said defendants appearing by their attorneys, Hannan, Johnson & Goldschmidt, represented by Herbert L. Wible, and the plaintiff appearing by his attorneys, Backus & Parson, represented by Francis H. Parson, and the court having made its order, dated the 10th day of November, 1949, wherein it is directed that judgment be entered in favor of the defendants and against the plaintiff, dismissing the complaint on its merits, together with costs and disbursements.

Now, Therefore, pursuant to said order and upon motion of Hannan, Johnson & Goldschmidt, attorneys for the defendants;

It Is Adjudged and Decreed that the complaint in the above entitled action be, and the same hereby is, dismissed upon its merits.

It Is Further Adjudged and Decreed that the defendants, Glenn C. Fetter and Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, do have and recover of the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, the sum of One Hundred Six and 70/100 ($106.70) Dollars, costs and disbursements. [fol. 92] Dated at Milwaukee, Wisconsin, this 25th day of November, 1949, at 2:50 P. M.

By the Court:

Fred J. Jaeger, Clerk, by Arthur A. Schumann, Deputy Clerk.

[fol. 93] [File endorsement omitted]

Copy

In Circuit Court of Milwaukee County

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Plaintiff,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Defendants

Decision on Defendants' Motion for Summary Judgment

October 28, 1949. Hon. Chas. L. Aarons, Judge

The action is one to recover damages because of the death of Harold G. Hughes by the wrongful act of the defendant Fetter. The defendants have moved for a summary judgment. At the time of the oral argument upon such motion the plaintiff presented a motion to amend his complaint by incorporating certain Illinois statutes governing actions for damages for death by wrongful act; and bearing upon liability and upon the duties of operators of motor vehicles. Such proposed amendment may be considered as allowed.

Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant [fol. 94] in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham County in the State of Illinois on January 9, 1948. Defendants contend that the action is not one "brought for a death caused in this state" and is therefore not maintainable by reason of the proviso contained in section 331.03, Wis. Stats. It appears to be conceded that both Hughes (the decedent) and the defendant Fetter were Wisconsin residents at the time of the accident; and that said defendant still resides in this state.

The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action upon the Illinois death statute. A copy of that statute is contained in Exhibit "A" attached to plaintiff's affidavit in opposition to the motion for summary judgment. A copy is also appended hereto (see page 11).

The Wisconsin statute on the subject is section 331.03 (Stats. 1947). It reads as follows:

> "331.03 *Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*" (Italics added.)

The sole question presented is whether the instant action is maintainable notwithstanding the above quoted proviso.

Plaintiff contends that the Wisconsin statute is inapplicable since he alleges that he brings his action under the Illinois Wrongful Death Statute. He cites section 391 of the Restatement on Conflict of Laws to the effect that

> "The law of the place of wrong governs the right of action for death";

and section 392:

> [fol. 95] "Action for the death of a person will be allowed in any state on a right of action created by the law of the place of wrong, if the right of action is given to compensate a person or persons injured by the death for the loss caused thereby."

The Wisconsin annotations supplementing these sections indicate that Wisconsin cases are in accord with the Restatement rule on the subject.

The rule referred to is, however, not in all cases a matter of strict right. It will be so regarded where the right to sue is, under the applicable facts, protected by the "full faith and credit" clause (Sec. 1 of Art. IV) or by Sec. 2 of Art. IV of the U. S. Constitution (the latter section declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several

states"). Where such constitutional sanctions are not involved the principles of comity govern.

> "By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens." *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 658 to 660.

By reason of the restricting effect of the proviso in section 331.03, Wis. stats. the situation here presented is governed by the following rule which in the language of the Restatement of Conflict of Laws, reads as follows:

> "§ 612. *Action Contrary to Public Policy.* No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

See also the substituted Comment (a) to said section 612 (Conflict of Laws) as contained in the 1948 supplement of the Restatement (p. 175).

Upon an examination of a large number of the decisions bearing upon the subject here considered the court is of the opinion that the principles which prevail in Wisconsin [fol. 96] as well as in Illinois are accurately stated in the following quoted paragraph from Vol. 11 *American Jurisprudence* at page 495:

> "§ 183. *Actions Contravening Public Policy.*—It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere. A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state.

> Moreover, forbidding the maintenance within the state of actions for personal injuries arising outside the state does not contravene a constitutional provision that every person ought to find a remedy in the law for all injuries and wrongs that he may receive in his person, property, or reputation."

See also the discussion of "*Comity*" in the same work, 11 Am. Jur., pages 296-306.

One of the cases referred to in § 183 (above quoted) is *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. p. 955. The case presents a close parallel to the instant situation—the only difference being in the phrasing of the Illinois statutory proviso having reference to actions for damages for wrongful death.

In the *Dougherty Case* the deceased—a citizen and resident of Illinois—was injured while in the employ of the defendant at Elizabeth, New Jersey and died in the latter state from the effect of his injury. The action was commenced in Illinois by the administrator of the deceased who was appointed by an Illinois Probate Court. The action was however alleged to be based upon a pleaded statute of New Jersey. Section 2 of the Injuries Act of Illinois provided that

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

[fol. 97] The trial court sustained a general demurrer to the complaint because of said proviso in the Illinois Injuries Act. Upon an appeal to the Illinois Supreme Court the plaintiff contended that the statutory provision referred to

> "does not prevent the bringing of an action in this state (Illinois) for death caused by wrongful act in another state, provided it is brought on the statute of such other state and not on the statute of Illinois; that, if this is not the proper construction of the statute above quoted, then such statute is unconstitutional." (99 N. E. page 620)

The court refused to assent to either of said contentions.

Quoting (in part) from the opinion of the court (Id. 620, 621):

"At common law no right of action existed for the recovery of damages for injury resulting in the death of a person caused by another's wrongful act. Such a right of action is statutory. * * * The acts of the Legislature of a state can have, in themselves, no extra-territorial effect. To put the interpretation upon this section now contended for by counsel would practically render it meaningless * * *.

A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state,' and also of paragraph 1 of section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' * * *

It was not intended by the provisions of the federal Constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. * * * *This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity.* In this country the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals, or policy of the forum. (Citing) * * * *If the policy of the forum has been expressed positively in a statute, that policy must prevail.* When the Legislature speaks upon a subject upon which it has constitutional power to legislate, *public policy is what the statute indicates.* (Citing) * * * Each state, subject to restrictions of the federal [fol. 98] Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has

arisen outside of the state. (Citing) * * * Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must *operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In this last case it was held that a statute of Ohio providing that no action could be maintained in that State for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the federal Constitution. A dissenting opinion, joined in by three members of the court, in effect conceded that *had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states it would have been constitutional.* The reasoning of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity, under the federal Constitution, of the provision of the Injuries Act above referred to. * * * (Id. p. 621)

It necessarily follows that the trial court rightly held that the courts of this state were without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed." (Italics added)

The above quoted views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers Case, supra*) and many other cases cited in the opinion (omitted in the above quotation) also received sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state so far as known to the writer. *Finney* v. *Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839); *Robertson* v. *Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 604-606, 36 L. Ed. 829, 833); *Bain* v. *Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox* v. *Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund* v. *Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. [fol. 99] *McAdam*, 142 Wis. 114, 121; *Bartlett* v. *Collins*, 109 Wis. 477, 482; *Porte* v. *C. & N. W. R. Co.*, 162 Wis. 446, 451.

It should be noted that the constitutional provision contained in Sec. 2 of Art. IV of U. S. Constitution is applicable in the event there should be any attempted impairment of the right of a citizen of another state to exercise the same right to sue in the courts of Wisconsin *that citizens of Wisconsin* have. *Eingartner* v. *The Illinois Steel Co.*, 94 Wis. 70; *State ex rel. Smith* v. *Belden*, 205 Wis. 158, 161, 162; *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142; 52 L. Ed. 143, 146 and 147; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, 360 (where *Mr. Justice Field* says:

> "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as advantages resulting from citizenship in those states are concerned.")

While the language of the proviso in the Illinois statute as quoted in the *Daugherty Case, ante* p. 5, is framed in the negative terms, and also has reference to the state where the death occurred, instead of—as in Wisconsin—to the state where the death was caused, it is not perceived that there is any substantial difference in the effect of the two statutes.

It should be noted not only that both the decedent in the instant case and the defendant were citizens of Wisconsin but that irrespective of such fact there is nothing in the Wisconsin Act (Sec. 331.03) which imposes restrictions upon non-residents which are not likewise imposed upon residents of the state of Wisconsin.

The plaintiff's position in denying the applicability of the Wisconsin statute is also asserted to be based upon the doctrine that "all legislation is *prima facie* territorial and it does not operate beyond the limits of the jurisdiction in [fol. 100] which it is enacted." *Bernard* v. *Jennings*, 209 Wis. 116, 120 (cited in plaintiff's brief). The distinction between the facts of that case and the instant one is obvious and requires no discussion. However, as considerable stress has been placed upon the matter of extraterritorial legislation it may be appropriate to point out

(1) *As to the Wisconsin Statute:* There is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force however whenever *within its own boundaries* claims are asserted which are in contravention of its provision.

(2) *As to the Illinois Statute:* In so far as the enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state. Otherwise the Illinois statute would be given extraterritorial force.

Plaintiff's counsel directs attention to *Sheehan* v. *Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state. It appears that in those cases the issues involved and considered did not include the specific question here raised. Those cases, therefore, cannot be considered as authoritative upon the question here presented.

In the *Sheehan Case* it appeared that Illinois—where the injury causing death occurred—had a statute prohibiting actions in that state to recover damages for death occurring outside of the state. A doctrine of reciprocity was contended for by the defendant in that case to bar the Wisconsin action, since Illinois under its statutes would have barred an action in that state for a death occurring outside of that state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added: "Wis. [fol. 101] consin has no such statute." The court quoted the first paragraph of Sec. 2 of Art. IV, U. S. Constitution, and added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." (218 Wis. at page 593) It is apparent that the fact was overlooked that Sec. 331.03 then—as at present—contained the proviso under which an action for damages for death by wrongful act could be maintained only if such action is brought "for a death caused in this state." As above indicated the proviso in order to have any force or effect possesses the same meaning as the negative form appearing in the Illinois statute.

The only case brought to the attention of the court dealing directly with the proviso contained in section 331.03 (then known as section 4255) is *Budigor* v. *Wisconsin, etc. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts if the death was *caused in* this state. *Id.* 192, 194, 195. The court said:

> "The object and effect of the proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring

within the state, without regard to whether the death occurred within or without it." *Id.* 195, 196.

Conclusion.

The words "provided that such action shall be brought for a death caused in this state" appearing at the end of the Wisconsin statute (Sec. 330.03) necessarily mean that the right to bring actions for wrongful death (a right non-existent at common law, *Schwab* v. *Nelson*, 249 Wis. 563, 565) is granted *only* in cases where the death was caused in this state. It therefore necessarily excludes cases where the death was caused in other states. The statute of another state cannot be made the basis of an action in Wisconsin [fol. 102] whose maintenance would be wholly inconsistent with the declared public policy of our legislature. To hold that this action could be maintained notwithstanding the fact that the death was not caused in this state would be to override such public policy as declared by statute; and would operate to deprive the proviso of purpose or meaning. As is shown by the above cited cases the conclusion here reached is not only in accordance with the rule of the U. S. Supreme Court and the Wisconsin Supreme Court but it is the law in the very state (Illinois) under whose wrongful death act the instant action is alleged to have been commenced. (*Dougherty Case, ante* pp. 5-7).

For the reasons stated the defendant's motion for a summary judgment dismissing the complaint must be granted.

(S.) Chas. L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin this 28th day of October, 1949.

[fol. 103] "Exhibit 'A'

Smith and Hurd Illinois Annotated Statutes

'Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party insured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to

an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2 Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.'"

[fol. 104] In Supreme Court of Wisconsin

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Respondents

Minute Entry—March 8, 1950

And now at this day came the parties herein, by their attorneys and this cause having been argued by Samuel Goldenberg, Esq., for the said appellant, and by Herbert Wible, Esq., for the said respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 105-106] In Supreme Court of Wisconsin, Milwaukee Circuit Court

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Respondents

Opinion by Justice Fairchild

Judgment—May 2, 1950

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Four Dollars and Fifty Cents ($104.50).

Justices Broadfoot and Brown dissent.

[fol. 107] In Supreme Court of Wisconsin, August Term, 1949

No. 187

Corbin D. Hughes, adm'r. of the Estate of Harold G. Hughes, Appellant,

v.

Glenn C. Fetter et al., Respondents

Appeal from judgment of the circuit court for Milwaukee county, Charles L. Aarons, circuit judge

Affirmed.

Opinion—Filed May 2, 1950

Corbin D. Hughes, administrator of the estate of Harold G. Hughes, brought this action against Glenn C. Fetter and Farmer Mutual Automobile Insurance Company, a Wis-

consin corporation, to recover damages for wrongful death based on the Illinois wrongful death statute, sections 1 and 20, Chapter 70, Smith-Hurd Illinois Annotated Statutes. The action was begun July 7, 1948. Defendant moved for summary judgment, and judgment was directed dismissing the plaintiff's complaint on the merits, November 25, 1949. Plaintiff appealed.

[fol. 108] Judge Aarons, who heard the matter, states the problem as follows:

"Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham county, in the state of Illinois, on January 8, 1948. Defendants contended that the action is not one 'brought for a ddath caused in this state' and is therefore not maintainable by reason of a proviso contained in section 331.03 Wis. Stats. It appears to be conceded that both Hughes, the decedent, and the defendant Fetter were Wisconsin residents at the time of the accident and that said defendant still resides in this state.

"The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action on the Illinois death statute."

[fol. 109] FAIRCHILD, J.:

The Wisconsin statute, section 331.03 which the learned trial judge ruled prevented the maintenance of the action and required a dismissal of the complaint does permit recovery for death by wrongful act. But it also contains the provision "that such action shall be brought for a death caused in this state." The question is now raised whether for a death in Illinois this action can be maintained in Wisconsin notwithstanding that provision in our statute.

The right to recover for death by wrongful act is purely statutory. The words of the statute, "provided that such action shall be brought for a death caused in this state" seem plain enough to bar cases not within its terms, and to exclude actions where the wrongful act resulting in death occurred in another state. This must be so, unless that provision is unconstitutional, or unless the rules of comity place

an obligation upon the courts of this state to voluntarily try a case arising under the Illinois wrongful death statute.

First, with respect to the constitutionality of the provision: We agree with the learned trial judge that the enactment is not in contravention of the full faith and credit clause of the Federal Constitution or of paragraph 1, section 2 of Article IV providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. It has been repeatedly declared to be the law that it was not intended by the provisions of the Federal Constitution referred to to give to the laws of one state any operation in other states except by permission, express or implied, by those states. *Paul v. Virginia,* 8 Wall. 168, 19 L. Ed. 357. The rule applies with full force to statutes giving a right of action for death by the wrongful act of another.

The policy of Wisconsin against the maintenance of such an action having been created positively in a statute, that policy must prevail. "Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citi- [fol. 110] zens and those of other states." *Chambers v. Baltimore & Ohio Railroad Co.,* 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In the case of *Dougherty v. American McKenna Process Co.,* 255 Ill. 369, 99 N. E. 619, L.R.A. 1915 F. 955, the Illinois court, in commenting on the Ohio decision, said: "The reason of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity under the Federal Constitution of the provision of the injuries act above referred to. . . . It necessarily follows that the trial court rightly held that the courts of this state are without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed."

The learned trial judge in the case at bar said that "the views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers Case, supra*) and many other cases cited in the opinion (in *Dougherty v. American McKenna Process Co., supra*) also receive sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state. . . . *Finney v. Guy,* 106 Wis. 256 (Syl. 3), 276,

277, 49 L.R.A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839; *Robertson v. Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604-606, 37 L. Ed. 829, 833); *Bain v. Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 285; *International Harvester Co. v. McAdam*, 142 Wis. 114, 121; *Bartlett v. Collins*, 109 Wis. 477, 482; *Porte v. C. & N. W. R. Co.*, 162 Wis. 446, 451.

Now as to the matter of comity: In this state the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals or policy of the state where the action is sought to be maintained. However, if the policy of the forum has been expressed positively in a statute, that policy must prevail. "When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what [fol. 111] the statute indicates." *Harding v. American Glucose Co.*, 182 Ill. 551; *People v. Shedd*, 241 Ill. 155; *Ziegler v. Illinois Trust and Savings Co.*, 245 Ill. 180; *Miner on Conflict of Laws*, section 6, page 10. By virtue of the doctrine of comity, rights acquired under statute enacted or judgment rendered in one state will be given force and effect in another, unless, as said, against policy or laws of the state, prejudicial to interests of its citizens or against good morals and natural justice; comity being a rule of practice, however, and not a rule of law. *In re Chase*, 141 S.E. 471, 473, 195 N.C. 143. The doctrine of comity results in recognition of a decree of a different state not entitled to full faith and credit. It is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens. 11 *Am. Jur., section* 183, page 495, *Corpus Juris Secundum*, Vol. 15, page 245, *Strawn Mercantile Co. v. First Nat. Bank, Tex.*, 279 S.W. 473, 474; *Baker River & S. R. Co. v. Nichols*, 99 P. 876, 877, 51 Wash. 619.

Plaintiff in support of his position here urges the doctrine that all legislation is *prima facie* territorial and does not operate beyond the jurisdiction in which it is enacted. He cites *Bernard v. Jennings*, 209 Wis. 116, 120. The distinc-

tion between the facts of that case and the instant one is obvious. The learned trial judge, because of the stress placed upon the matter of extraterritorial legislation, thought it appropriate to point out that as to the Wisconsin statute there is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force, however, whenever within its own boundaries claims are asserted. As to the Illinois statute, he said: "In so far as its enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state; otherwise the Illinois statute would be given extraterritorial force."

Plaintiff's counsel directs attention to the case of *Sheehan v. Lewis*, 218 Wis. 588 and other Wisconsin cases where actions for wrongful death—although caused in other [fol. 112] states—were maintained in this state, after the enactment of our statute. It appears that in those cases the particular point involved and here considered was not advanced. Those cases, therefore, cannot be considered as authoritative upon the question here presented. They did not change the statute. In the *Sheehan case, supra*, it appeared that Illinois, where the injury causing death occurred, then had the same statute which has been referred to in this case, prohibiting actions in that state to recover damages for death occurring outside of the state. In that case a doctrine of reciprocity was contended for by the defendant to bar the action in Wisconsin, since Illinois under its statute would have barred an action in that state for a death occurring in this state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added these words: "Wisconsin has no such statute." There was then quoted the first paragraph of section 2 of Article IV, U. S. Constitution, and we added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." *Sheehan v. Lewis, supra*, p. 593. It is apparent that the full contents of section 331.03 was not given due consideration. And it is evident that the decision resulted from circumstances similar to those referred to in *Kelso Company v. Ellis*, 224 N. Y. 528, 537, where Judge Pound said: "Even in this court a dictum in *Bank of America v. Waydell* (187 N. Y. 113, 120) reveals the habit of bench and bar to look to cases

rather than statutes . . . until attention is sharply directed" to the existence of a policy fixing statute.

The only case brought to the attention of our court dealing directly with the proviso contained in section 331.03 Wis. Stats. is *Rudiger v. Chicago, et. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts, if the death was caused in this state; and we held that the "object and the effect of the proviso in our statute was to render the action local and limit it to cases where death was caused by actions committed or occurring within this state, without regard to whether the death occurred within or without it."

[fols. 113-117] The suggestion that the doctrine of *stare decisis* ought to control our decision upon the matter here involved is without weight. *Reiter v. Grober*, 173 Wis. 493. We do not find that a rule of property was involved, nor do we find any basis existing for the court to review the conclusion reached by the legislature. Its findings are not, under the circumstances, subject to judicial review. Therefore in deference to the determination of the legislature and the plain requirements of its act, any statements made in our opinions in cases heretofore treating with a similar situation which are contrary to the opinion here expressed are withdrawn. As pointed out in the opinion of the learned trial judge, the precise point relating to the statute was not considered in the Wisconsin cases relied upon by the plaintiff.

The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks the benefit of a remedy denied him by the law of the forum. *Estate of Seybold*, 223 Wis. 192. As is shown by the above cited cases, the conclusion here reached is not only in accordance with the ruling of the U. S. Supreme Court and the Wisconsin Supreme Court, but it is the law in the very state, Illinois, under whose wrongful death act the instant

action is alleged to have been commenced. *Dougherty v. McKenna Process Co., supra.*

The defendants' motion for summary judgment dismissing the plaintiff's complaint was properly granted.

By the Court: *Judgment affirmed.*

[fols. 118-119] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 30, 1950

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

[fol. 120] IN THE SUPREME COURT OF THE UNITED STATES

— 355

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed October 19, 1950

(A) Appellant adopts, for his Statement of Points upon which he intends to rely in his appeal to this Court, the points contained in his Assignment of Errors heretofore filed. (Rec. 9-10)

(B) Appellant designates the entire record herein for printing by the Clerk of this Court, except that the following may be omitted:

Rec. 4-5, "Order Allowing Appeal" (print title only).

Rec. 7-8, "Bond" (print title only).

Rec. 11-12, "Citation on Appeal" (print title only).

Rec. 20-26, Appendix A to Jurisdictional Statement, being opinion of the Wisconsin Supreme Court (print title only: "Appendix A, Opinion of Wisconsin Supreme Court —appears at Rec. 106-113.")

Rec. 27-39, Appendix A-1 to Jurisdictional Statement, being opinion of Charles L. Aarons, Circuit Judge of the

Circuit Court of Milwaukee County, Wisconsin (print title only: "Appendix A-1, Opinion of trial court judge—appears at Rec. 93-103, incl.")

[fol. 121] Rec. 47-49, print title only: "Praecipe to the Clerk of the Wisconsin Supreme Court."

Rec. 51-52, print title only: "Proof of Service (papers on appeal to United States Supreme Court)."

Rec. 54-55, print title only: "Notice of Appeal to Wisconsin Supreme Court."

Rec. 56-57, print title only: "Undertaking on Appeal to Wisconsin Supreme Court."

Rec. 57-a, print title only: "Certificate of Clerk."

Rec. 58-59, print title only: "Proofs of Service of Summons and Complaint."

Rec. 60, print title only: "Summons"

Rec. 61-66, In Complaint, *omit* pars. 4, 7 and all of Second Cause of Action.

Rec. 71-72, "Answer of Farmers Mutual Automobile Insurance Company"—*omit* except for caption. (Substantially the same as answer of the individual defendant.)

Rec. 75. *Omit* Notice of Motion for Summary Judgment.

Rec. 85-87, print title only: "Notice of Motion for Leave to Amend Complaint."

Rec. 114-116, print title only: "Motion for Rehearing in Wisconsin Supreme Court."

Rec. 117—print title only: "Order Retaining Record."

Rec. 118—print title only: "Order Denying Motion for Rehearing."

[fol. 122] Rec. 119—print title only: "Certificate of Clerk of the Supreme Court."

Dated at Milwaukee, Wisconsin, this 17th day of October, 1950.

Samuel Goldenberg, Attorney for Appellant.

[fol. 123] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 355

ORDER NOTING PROBABLE JURISDICTION—November 13, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Samuel Goldenberg. File No. 54,861. Wisconsin Supreme Court, Term No. 355. Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant, vs. Glenn C. Fetter and Farmers Mutual Automobile Insurance Company. Filed October 12, 1950. Term No. 355 O. T. 1950.